

Editor's note: appealed - Civ.No. 81-324 (D.Alaska Aug. 1981); stayed pending state court action (Oct. 25, 1982).

GEORGE H. FENNIMORE ET AL.

IBLA 80-613

Decided October 6, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring mining claims null and void in part. AA-27016, AA-27017.

Affirmed.

1. Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Effect of

A mining claim located on land which was then segregated and closed to mineral entry is properly declared null and void ab initio.

2. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Appeals: Effect of--Rules of Practice: Hearings

Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: J. L. McCarrey, Jr., Esq., McCarrey and McCarrey, Anchorage, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated March 26, 1980, by the Alaska State Office, Bureau of Land Management (BLM), declaring the

Maui 29 and the Maui 30 placer mining claims null and void in part, and rejecting in part, recordation filings for those claims.

These claims, located on June 2, 1954, are situated in sec. 23, T. 21 S., R. 17 E., Copper River meridian, Alaska. On July 11, 1979, copies of the location notices were filed with the Alaska State Office.

On May 4, 1942, the fractional west half of sec. 23 was included, among other lands, in Air Navigation Site Withdrawal No. 178 (ANS 178). On December 13, 1977, Public Land Order No. 5628 transferred jurisdiction over certain lands within ANS 178, including the fractional west half of sec. 23, to BLM. The lands were simultaneously withdrawn for selection by Chugach Natives, Inc., pursuant to the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, 43 U.S.C. § 1601 (1976).

The decision appealed from found that the lands encompassed by ANS 178 had been segregated from the operation of United States mining laws since May 4, 1942. Accordingly, it declared the claims null and void ab initio and rejected the recordation filings in part, to the extent that the claims lie in the west half of sec. 23, T. 21 S., R. 17 E., Copper River meridian.

Appellants do not dispute the withdrawal but assert that they have been deprived of property rights, that estoppel, waiver, and laches apply to void the effect of the decision appealed from.

[1] These mining claims were properly declared null and void ab initio as to those areas within the withdrawal. Conrad F. Sovik, 45 IBLA 14 (1980); American Resources, Ltd., 44 IBLA 220 (1979); Janelle R. Deeter, 34 IBLA 81 (1978). In order to prevail, appellants would have to show that their rights to these lands antedated the May 4, 1942, withdrawal, which they have not done. It is well established, and has often been held that a mining claim located on land segregated from mineral entry is properly declared null and void ab initio. Leo J. Kottas, 73 I.D. 123 (1966), aff'd sub nom. Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970).

[2] Appellants' allegations concerning estoppel, waiver, laches, and deprivation of property are without merit. The elements of estoppel are not present in this case. See Edward L. Ellis, 42 IBLA 66 (1979). Moreover, due process does not require notice and a right to be heard in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. State of Alaska, 46 IBLA 12 (1980).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I agree with the affirmance of the BLM decision. I disagree with the implication in the majority decision that the appellant is being deprived of property. The land involved here was withdrawn from the location of mining claims since 1942. No property rights were created by the location of a claim on land not subject to location. The land status is a matter reflected on the public records of this Department and may be officially noticed. For this reason there can be no dispute as to the facts concerning the land status which would require a hearing as to appellant's claims under due process of law considerations. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971).

If, as appellants contend, they were misled by actions of BLM, this undoubtedly arose from land description problems in connection with the mining claims relating to unsurveyed lands. In any event, any prior action by BLM could only have been effectual as to those portions of the claims which were on lands which had not been withdrawn or segregated from mining claim location. No action by a BLM official, could have the effect of validating a claim or portion thereof which was null and void ab initio because the land was withdrawn and remained withdrawn. For these reasons, I concur in the result reached by the majority.

Joan B. Thompson
Administrative Judge

